



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 10, 1993

Mr. Boyd Johnson
Legal Services Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR93-515

Dear Mr. Johnson:

The Texas Parks and Wildlife Department (the "department") received three requests for information relating to the department's game warden training selection process and requested a decision of this office pursuant to section 7 of the Texas Open Records Act (the "act"), V.T.C.S. article 6252-17a. You claimed that sections 3(a)(3) and 3(a)(11) except the requested information from required public disclosure. Because the decision in *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ) required reexamination of the section 3(a)(11) exception, we allowed you an additional 15 days to submit arguments in accordance with the *Gilbreath* decision. We now consider the additional arguments you have submitted for withholding the requested documents under sections 3(a)(3) and 3(a)(11) of the act. We have assigned your request ID# 18596.

We have examined the information submitted to us for review. Although the attorney general will not ordinarily raise an exception that the governmental body has failed to claim, we will raise section 3(a)(1) because the release of confidential information could impair the rights of third parties and because improper release constitutes a misdemeanor. See V.T.C.S. art. 6252-17a, § 10(a); Open Records Decision Nos. 455 (1987); 325 (1982). Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The information submitted to us for review includes criminal history information compiled by the department in the "Background Investigation Report", specifically, sections 2 and 3 of the report entitled "Violation Record."¹ Criminal history information generated within the state of Texas is excepted from required public disclosure under section 3(a)(1) in conjunction with common law privacy doctrine. See *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931

¹Part 1 of the "Violation Report" asks the applicant to list his traffic offenses. Traffic citations do not generally constitute "criminal history information." See, e.g.; 28 C.F.R. § 20.20 (b)(5).

(information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public); Open Records Decision No. 565 (1990); *see also* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U. S. 749 (1989) (finding criminal history information protected from disclosure under Freedom of Information Act by privacy interest of the individual who is the subject of the information). Accordingly, sections 2 and 3 of the "Violation Record" portion of the "Background Investigation Report" accompanying each application must be withheld from required public disclosure.²

You claim that the requested information is excepted from required public disclosure by section 3(a)(3) of the act. To secure the protection of section 3(a)(3), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986). When a requestor publicly states on more than one occasion an intent to sue, that fact alone does not trigger section 3(a)(3). *Id.* Likewise, an isolated telephone threat of litigation, without more, does not trigger section 3(a)(3). *Id.*

You seek to withhold the requested information under section 3(a)(3) because the father of one of the requestors on one occasion has made known his intention to file a lawsuit to challenge the department's game warden training selection process. The requested information, however, may not be withheld under section 3(a)(3) on the basis of this threat alone. You have provided us with no other information demonstrating the pendency or likelihood of litigation. Accordingly, we conclude that you may not withhold the requested information under section 3(a)(3) of the act.

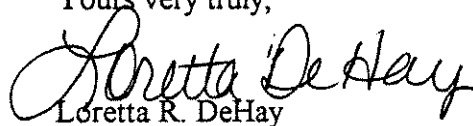
You also seek to withhold the requested information under section 3(a)(11), which excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993) (copy enclosed), this office reexamined the section 3(a)(11) exception in light of the *Gilbreath* decision and held that section 3(a)(11) excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass routine internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. As the information

²Under section 3B of the act, however, the requestor may not be denied access to such information for privacy reasons if the information relates to the requestor and the only interest protected by withholding the information is the privacy of the requestor. *See* Open Records Decision Nos. 565 (1990); 481 (1987) (common-law privacy does not provide a basis for withholding information from its subject).

submitted to us for review relates to a department internal or administrative matter, *i.e.*, the selection of individuals for game warden training, it does not fall within the ambit of the section 3(a)(11) exception. Accordingly, except as noted above, the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/jmn

Enclosures: Open Records Decision No. 615

Ref.: ID# 18596

cc: Mr. Brent D. Adams
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(w/o enclosures)